

# Comment

## A Court of Tax Appeals Revisited

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In 1925, Judge Oscar Bland of the United States Court of Customs Appeals published a short article in the *Columbia Law Review* criticizing the process of federal tax litigation as clumsy, time-consuming, and slow to resolve conflicting interpretations of the law. Judge Bland suggested that a single court be vested with national jurisdiction for all appeals of trial level decisions involving federal tax issues.<sup>1</sup> Since that time, many others have shared Judge Bland's unhappiness with a state of affairs in tax litigation best described by Roswell Magill in 1943:

At the present time, it is impossible to obtain a really authoritative decision of general application upon important questions of law for many years after the close of any taxable year. . . . If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we would hardly do better than to provide for 87 [now 94] Courts with original jurisdiction, 11 appellate bodies of co-ordinate rank, and only a discretionary review of relatively few cases by the Supreme Court.<sup>2</sup>

Fifty years after Judge Bland's proposal, our system for the resolution of federal tax controversies still lacks a unified court to hear tax appeals and still is plagued by the uncertainty so accurately described by Magill. In this Comment, I will argue that the continued existence of such uncertainty, at a time when the tax law is ever expanding and more complex, requires a reform of the present system of resolving tax disputes, and that the most effective method of reform is the establishment of a "Court of Tax Appeals." I will also show that it is possible to tailor the contours of such a court to overcome many of the objections raised against it. This Comment concludes with a detailed proposal for the creation of a Court of Tax Appeals.

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1. Bland, *Federal Tax Appeals*, 25 COLUM. L. REV. 1013 (1925). Under Judge Bland's plan, the Commissioner of Internal Revenue was to have the power to hear evidence and decide all tax controversies. Taxpayers could contest such decisions by appeal to the Board of Tax Appeals within the Treasury Department. The Board's decisions were to be reviewable only by the United States Court of Revenue Appeals, a renamed and expanded Court of Customs Appeals. This new court's decisions were reviewable by the United States Supreme Court, but only when the Attorney General certified that the decision involved an important question of law.

2. R. MAGILL, *THE IMPACT OF FEDERAL TAXES* 209 (1943).

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## I. Previous Consideration

Despite earlier proposals by Roger Traynor<sup>3</sup> and Charles Lowndes,<sup>4</sup> the argument for a Court of Tax Appeals has been most closely associated with an article published in 1944 by Dean Griswold.<sup>5</sup> Hoping to disassociate himself from the furor surrounding Traynor's plan,<sup>6</sup> which called for the complete restructuring of administrative and

3. Traynor, *Administrative and Judicial Procedure for Federal Income, Estate and Gift Taxes—A Criticism and a Proposal*, 38 COLUM. L. REV. 1393 (1938). Traynor proposed the establishment of a Court of Tax Appeals as part of an extensive plan to reform the administrative and judicial procedures for the resolution of controversies concerning federal income, estate, and gift taxes. The plan, which was somewhat like Judge Bland's, removed tax controversies from the jurisdiction of the district courts, the courts of appeals, and the Court of Claims. It modified administrative procedures for settling tax cases and provided that all tax cases not settled administratively would be heard by a decentralized Board of Tax Appeals, whose decisions would be appealable to a single Court of Tax Appeals sitting in Washington. Professor Traynor contended that a Court of Tax Appeals was needed because the existing system of tax litigation promoted delay and uncertainty and discouraged settlements.

The Traynor proposal was actively supported by Stanley Surrey. See Surrey, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U.L.Q. 399, 414-23 (1940); Surrey, *The Traynor Plan—What It Is*, 17 TAXES 393, 396 (1939); Traynor & Surrey, *New Roads Towards the Settlement of Federal Income, Estate, and Gift Tax Controversies*, 7 LAW & CONTEMP. PROB. 336, 349-52 (1940). Other contemporaries, however, strongly criticized Traynor's suggestions. See, e.g., Angell, *Procedural Reform in the Judicial Review of Controversies under the Internal Revenue Statutes: An Answer to a Proposal*, 34 ILL. L. REV. 151 (1939); Prettyman, *A Comment on the Traynor Plan for Revision of Federal Tax Procedure*, 27 GEO. L. REV. 1038, 1043-50 (1939); Prettyman, *The Traynor Proposals—Some Considerations*, 17 TAXES 397 (1939); Sutherland, *New Roads to the Settlement of Tax Controversies: A Critical Comment*, 7 LAW & CONTEMP. PROB. 359, 360-61 (1940); Youngquist, *Proposed Radical Changes in the Federal Tax Machinery*, 25 A.B.A.J. 291, 295-96 (1939). Criticism of the Traynor proposal centered on the suggested changes in administrative procedures and the elimination of district court and Court of Claims jurisdiction in tax cases. Although such criticisms may have caused many people to reject the Traynor proposal, I am concerned here only with those criticisms which were directed at the establishment of a Court of Tax Appeals.

Critics of the proposed court argued that Professor Traynor overemphasized the conflict and uncertainty in the tax system, that there was no reason to treat tax law separately from the rest of jurisprudence, and that separate treatment would have adverse effects on the system of tax law. They asserted that a specialized court would deprive the tax law of the benefits of well-rounded judges and attorneys and would encourage technical decisions and loss of contact with general principles of law. The critics also feared that one central appellate court could not render proper decisions concerning issues of local law, that having such a court would discourage Supreme Court review, and that it would eliminate the benefits of having more than one appeals court carefully consider the important issues of tax law. They even suggested that the proposed court would not eliminate conflict and confusion because the opinions of the subordinate Board of Tax Appeals might differ from those of the court. As will be seen, these criticisms have been leveled at every proposal to establish a Court of Tax Appeals. One principal purpose of this Comment is to demonstrate, through a more detailed proposal, how these problems can be overcome.

4. Lowndes, *Taxation and the Supreme Court, 1937 Term*, (pt. II), 87 U. PA. L. REV. 165, 200 (1938). In the furor which followed the introduction of the Traynor proposal, the Lowndes proposal was largely ignored.

5. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944).

6. *Id.* at 1184-88.

judicial procedures used in the resolution of tax controversies, Griswold argued that many of the perceived inadequacies of federal tax administration could be solved merely by creating a Court of Tax Appeals. Because most tax controversies are settled administratively, Dean Griswold contended that the goal of the tax litigation process should be the development of authoritative rules to guide the administrative disposition of such controversies. Instead, Griswold found an existing system of adjudication in which 12 different courts—the courts of appeals and the Court of Claims—could create variant rules on the same issue of tax law with only occasional review by the Supreme Court. The development of authoritative rules was an unnecessarily long and sometimes unsuccessful process. As a result, argued Griswold, uniform administrative treatment of taxpayers in different jurisdictions was difficult to achieve.

The court proposed by Dean Griswold was to have exclusive jurisdiction to review all civil tax cases of the Tax Court, the federal district courts, the Court of Claims, and in some instances, state courts. Further appeals would lie only to the Supreme Court. In 1943, 309 tax opinions were issued by the courts of appeals, and Dean Griswold believed that nine judges could handle such a caseload.<sup>7</sup> These nine judges would sit in various locations around the country, preferably, Griswold implied, en banc or as a nearly full complement.<sup>8</sup> A system might be worked out for having cases heard by less than the whole court, but divisions of the court were not to be permanent and all decisions were to be treated precedentially as decisions of the whole court.

Griswold's plan encountered immediate opposition from Robert N. Miller, a member of the six-man Committee on Federal Judicial and Administrative Procedure of the Section of Taxation of the American Bar Association.<sup>9</sup> In an article appearing in 1945, Miller contended that a Court of Tax Appeals would not solve the problems of delay and uncertainty. First, the vast majority of each circuit's tax decisions were not in conflict with any other circuit, and already were effectively final; the consistency of unified appellate review would be important only in the small number of cases which remained in conflict until certiorari was granted. Second, it would have no significant effect on delays encountered in the resolution of issues at the administrative or

7. If they could not, he provided for the appointment of additional judges on a temporary basis. *Id.* at 1180-81.

8. *Id.* at 1181.

9. Miller, *Can Tax Appeals Be Centralized?*, 23 TAXES 303 (1945).

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trial level.<sup>10</sup> Miller also argued that for the sake of uniformity, all hearings and decisions of the proposed court would have to be en banc; that for the sake of fairness, the court would have to travel to hear cases; and that no court could meet these joint burdens. Finally, Miller claimed that the court would become politicized, that it would lose contact with the general law, and that it would serve as precedent for the creation of specialized courts in every field of law. Two of Miller's fellow committee members had previously voiced opposition to a Court of Tax Appeals;<sup>11</sup> with one-half of the committee on public record against the establishment of such a court, the committee issued a report which repeated Miller's basic arguments and which recommended that the American Bar Association formally oppose the establishment of a Court of Tax Appeals.<sup>12</sup> Such a resolution was adopted by the Association in 1945.<sup>13</sup>

In the subsequent 30 years, more than 20 writers have put forward or opposed various proposals to create a Court of Tax Appeals. Despite the number of writers commenting on such proposals, however, very few new ideas have been articulated. Those favoring the creation of a Court of Tax Appeals have generally restated the arguments of Dean Griswold,<sup>14</sup> while those opposing have repeated the arguments put

10. Miller based this conclusion on Remmlein, *Tax Controversies—Where Goes the Time?*, 13 GEO. WASH. L. REV. 417 (1945).

11. The other authors already on record were G. Aaron Youngquist and William A. Sutherland. See Youngquist, *supra* note 3; Sutherland, *supra* note 3.

12. ABA, SECTION OF TAXATION, REPORT OF THE COMM. ON FEDERAL JUDICIAL AND ADMINISTRATIVE PROCEDURE (1945) (on file with *Yale Law Journal*). Although the committee rejected the Griswold proposal, it did indicate that it was studying other proposals. Those alternatives included creating a separate Department of Tax in the executive branch, requiring the Government to follow the decision of the first court of appeals to decide an issue or else to apply for certiorari, allowing appeal of trial level tax cases directly to the Supreme Court when the Attorney General certified that an important question of tax law was involved, and empowering the Chief Justice of the United States to administer a system for having at least one experienced "tax" judge appointed to each appellate court tax case.

13. 70 A.B.A. REP. 144 (1945). See p. 242 *infra* for the current position of the ABA Section of Taxation with respect to the establishment of a Court of Tax Appeals.

14. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 604-12 (1969); Del Cotto, *The Need for a Court of Tax Appeals: An Argument and a Study*, 12 BUFFALO L. REV. 5 (1962); Dwan, *Administrative Review of Judicial Decisions: Treasury Practices*, 46 COLUM. L. REV. 581, 584-85 (1946); Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 488-90 (1945); Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 85 (1960); Heckerling, *The Quest for Tax Certainty: A Court of Tax Appeals*, 40 TAXES 37 (1962); Lyon, *Federal Income Taxation*, 35 N.Y.U.L. REV. 697 (1960); Pope, *A Court of Tax Appeals: A Call for Re-examination*, 39 A.B.A.J. 275 (1953); Rice, *Law, Fact, and Taxes: Review of Tax Court Decisions Under Section 1141 of the Internal Revenue Code*, 51 COLUM. L. REV. 439, 454 n.75 (1951); Roberts, Friedman, Ginsburg *et al.*, *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 325, 354-55 (1972) (New York State Bar Ass'n, Tax Section, Comm. on Tax Policy); Remarks by the Honorable Meade Whitaker, Chief

forth by Miller and the American Bar Association.<sup>15</sup> Nonetheless, two recent proposals for a Court of Tax Appeals do merit special attention.

Perhaps the most extensive proposal since that of Griswold was made by Judge Henry J. Friendly in 1973.<sup>16</sup> In order to provide for the "authoritative determination of questions of statutory interpretation short of the Supreme Court,"<sup>17</sup> he proposed: (1) that the civil tax jurisdiction of the district courts and the Court of Claims be removed (except perhaps in cases involving liens or collections) and placed in an expanded and decentralized Tax Court; (2) that the cases decided by the Tax Court be appealable to a single Court of Tax Appeals, consisting of nine judges who would ride circuit throughout the country, hearing cases en banc or in panels of three, depending on the importance of the case; and (3) that the decisions of the Court of Tax Appeals be reviewable by the Supreme Court only if a constitutional issue were involved. In a subsequent article, Judge Friendly reiterated the need for a Court of Tax Appeals and suggested that it should be created even if not immediately accompanied by reform at the trial level.<sup>18</sup>

*Counsel, Internal Revenue Service, Before the Section of Taxation*, 29 TAX LAW. 11 (1975); Note, *Controversy Between the Tax Court and Courts of Appeals: Is the Tax Court Bound by the Precedent of Its Reviewing Court?*, 7 DUKE BAR J. 45, 51 (1975); Note, *The Old Tax Court Blues: The Need for Uniformity in Tax Litigation*, 46 N.Y.U.L. REV. 970, 974-83 (1971). See generally Shapiro, *The Warren Court and Federal Tax Policy*, 36 SO. CAL. L. REV. 208, 223-28 (1963) (in which Shapiro expresses a desire for the Supreme Court to be more active in tax law, but recognizes that in the absence of such activity, a Court of Tax Appeals might be needed to counter the potential for administrative discrimination which exists when substantive rules are unsettled). Still other writers have called for a thorough reconsideration of the 1944 Griswold proposal. See R. PAUL, *TAXATION IN THE UNITED STATES* 668 (1954); Brown, *The Growing "Common Law" of Taxation*, 1961 U. SO. CAL. TAX INST. 1, 26; Cary, *Reflections Upon the American Law Institute Tax Project and the Internal Revenue Code: A Plea for a Moratorium and Reappraisal*, 60 COLUM. L. REV. 259, 281 (1960); Walters, *The Role of the Department of Justice in Tax Litigation*, 23 S.C.L. REV. 193, 204 (1971).

15. See COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* 64 (1975) [hereinafter cited as HRUSKA COMM'N REPORT] (Sen. Roman Hruska was chairman of the Commission); Ferguson, *Jurisdictional Problems in Federal Tax Controversies*, 48 IOWA L. REV. 312, 370-81 (1963); Goldring, *Integration of the Tax Court into the Federal Judicial System*, 25 TAXES 445 (1947); Miller, *The Courts of Last Resort in Tax Cases: A Specialized Court of Tax Appeals?*, 40 A.B.A.J. 563 (1954); Remmlein, *A Time Study of Certain Tax Controversies*, 16 GEO. WASH. L. REV. 238 (1948). See also *Panel Discussion—Court Jurisdiction in Civil Tax Litigation: The Tydings Bills and the Rogovin Report*, 22 TAX LAW. 687, 702-03 (1969).

One later argument made against the creation of a Court of Tax Appeals is the contention that Congress has already in effect considered and rejected such a court. Specifically, the enactment of the predecessor of § 7482 of the Code is said to evidence a congressional intent to deny specialists such as Tax Court judges any final say in tax matters. See note 71 *infra*.

16. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW*, 161-71 (1973).

17. *Id.* at 161-62.

18. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 644 (1974).

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A second recent proposal is interesting not for the novelty of its ideas but for the identity of its proponents. In a recent report, a committee of the tax section of the New York State Bar Association, which joined with the American Bar Association in 1946 in opposing a Court of Tax Appeals, strongly endorsed the creation of a Court of Tax Appeals: "The arguments for the creation of a tax court of appeals are overwhelming. Such a court should be established without further delay."<sup>19</sup>

### II. The Need for Unified Appellate Review of Tax Cases

The present system of resolving tax controversies at the appellate court level is in need of substantial reform. The federal tax law is a complex matrix of statutory, administrative, and judicial law, whose administration is based on a system of self-assessment and resolution of controversies at the administrative level.<sup>20</sup> The reliance on self-assessment and administrative resolution of controversies makes it imperative that unnecessary uncertainty and delay in interpretation be minimized. As Justice Jackson noted in *Dobson v. Commissioner*, "[n]o other branch of the law touches human activities at so many points. It can never be made simple, but we can try to avoid making it needlessly complex."<sup>21</sup>

The present appellate court system does not meet the needs of our system of taxation because it unnecessarily hinders the sure and speedy resolution of tax law controversies. Each court of appeals has only a segment of the first level appellate jurisdiction. If one court of appeals adopts a rule of tax law, that rule governs only the taxpayers in

19. Roberts, Friedman, Ginsburg *et al.*, *supra* note 14, at 358. The report has not been approved or disapproved by the bar association as a whole. The New York State Bar Association opposed the creation of a Court of Tax Appeals in 1946, on the ground that such a specialized court was not needed because its only purpose was to reduce delay in resolving the small percentage of cases that involve conflicts between courts of appeals. See Goldring, *supra* note 15, at 448.

20. The importance of self-assessment and the administrative resolution of controversies is highlighted by the following data from fiscal year 1974:

<i>Item</i>	<i>Number</i>
Federal tax returns filed	121,609,260
Returns examined	2,030,655
Civil cases received by the appellate division [of the Internal Revenue Service]	18,569
Civil cases docketed in the trial courts	9,932
Civil cases decided by the courts of appeals	363
Civil cases decided by the Supreme Court	4

COMMISSIONER OF INTERNAL REVENUE, 1974 ANNUAL REPORT 106 [hereinafter cited as 1974 COMMISSIONER'S ANNUAL REPORT].

21. 320 U.S. 489, 494-95 (1943).

the circuit; even they may be able to avoid the rule by litigating in the Court of Claims. The limited effect of a court of appeals decision is highlighted by two cases involving the same issue and the same finance and loan corporation. In *Paul E. Puckett*,<sup>22</sup> the Tax Court decided for the taxpayer because an appeal would lie to the Fifth Circuit, which previously had held that finance and loan corporations were exempt from the subchapter S termination rules of § 1372(e)(5) of the Internal Revenue Code. In *Kenneth W. Doehring*,<sup>23</sup> however, the decision of the Tax Court was appealable to the Eighth Circuit, which had not previously ruled on the subchapter S exemption. The Tax Court, developing its own theory, found that the termination rules did apply, and therefore held for the government.

Uncertainty over which rule of tax law to follow arises not merely when there are conflicting appellate court decisions, but whenever there is even a reasonable possibility that another court of appeals or the Court of Claims might adopt a rule different from that adopted by the first court of appeals to face the issue. For example, the Internal Revenue Service recently announced<sup>24</sup> that it will not follow the decision of the Ninth Circuit in *Golconda Mining Corp. v. Commissioner*,<sup>25</sup> which held that the accumulated earnings tax could not be imposed against a publicly held corporation. To the extent that the argument of the Revenue Service is likely to convince other courts of appeals, *Golconda Mining* becomes of little value for the tax planning of transactions which reach beyond the borders of the Ninth Circuit. Similarly, although the First Circuit held in *Robin Haft Trust v. Commissioner*<sup>26</sup> that a "family fight" may be considered in applying the attribution rules of § 318 of the Code, there is no assurance that the next court facing the issue will follow the *Haft* decision. Tax planning must continue in a state of uncertainty.<sup>27</sup>

This uncertainty as to which rule of tax law to follow may exist even in situations in which more than one court of appeals has adopted the same rule of law. Thus, though several courts of appeals have held that the delivery by an employer of a promissory note to a pension trust constitutes payment within the meaning of § 404(a) of the Code

22. 33 CCH Tax Ct. Mem. 1038 (1974).

23. 33 CCH Tax Ct. Mem. 1035 (1974).

24. Rev. Proc. 75-76, 1975 INT. REV. BULL. No. 5, at 26.

25. 507 F.2d 594 (9th Cir. 1974).

26. 510 F.2d 43 (1st Cir. 1975).

27. As a final example, a tax planner may be reluctant, in light of the views expressed by several judges of the Tax Court, to advise his client that estate tax planning fees are currently deductible, even though the Court of Claims has ruled that they are. See Sidney Merians, 60 T.C. 187 (1973), *acquiesced in*, 1973-2 CUM. BULL. 2 (including four concurring opinions and one dissenting opinion); *Carpenter v. United States*, 338 F.2d 366 (Ct. Cl. 1964).

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and entitles the employer to a deduction, the Tax Court and the Revenue Service still take the position that the delivery of such a note does not constitute payment.<sup>28</sup> Other examples of continued uncertainty span the spectrum of tax law, from questions of statutory construction to questions involving the judge-made "common law" of federal taxation. Thus, despite the decision of one or more courts of appeals, there is still uncertainty concerning the deductibility of home office expenses,<sup>29</sup> the treatment of accounts payable in a § 351 incorporation of a cash basis partnership,<sup>30</sup> the applicability of the *Libson Shops*<sup>31</sup> doctrine under the 1954 Code,<sup>32</sup> the taxability of state trooper meal allowances,<sup>33</sup> and the effect of § 269 on corporate acquisitions for the purpose of utilizing post-acquisition losses.<sup>34</sup>

It should be emphasized that this uncertainty and delay has continued despite the theoretical availability of Supreme Court review. The Supreme Court has a heavy caseload<sup>35</sup> and has shown reluctance

28. Compare *Wasatch Chem. Co. v. Commissioner*, 313 F.2d 843 (10th Cir. 1963), *Time Oil Co. v. Commissioner*, 258 F.2d 237 (9th Cir. 1958), and *Sachs v. Commissioner*, 208 F.2d 313 (3d Cir. 1953), with *Don E. Williams Co.*, 62 T.C. 166 (1974).

29. Compare *Bodzin v. Commissioner*, 509 F.2d 679 (4th Cir. 1975), *rev'g* 60 T.C. 86 (1973), *cert. denied*, 96 S. Ct. 40 (1975), with *Newi v. Commissioner*, 432 F.2d 998 (2d Cir. 1970).

30. Compare *Bongiovanni v. Commissioner*, 470 F.2d 921 (2d Cir. 1972), with *Wilford E. Thatcher*, 61 T.C. 28 (1973), *appeal docketed*, No. 74-2245 (9th Cir., July 1, 1974).

31. *Libson Shops v. Koehler*, 353 U.S. 382 (1957).

32. Compare *Maxwell Hardware Co. v. Commissioner*, 343 F.2d 713 (9th Cir. 1965), and *Frederick Steel Co. v. Commissioner*, 375 F.2d 351 (6th Cir.), *cert. denied*, 389 U.S. 911 (1967), with *Tech. Info. Rel. 773*, 6 P-H 1965 FED. TAXES ¶ 55,063.

33. Compare *Wilson v. United States*, 412 F.2d 694 (1st Cir. 1969), with *United States v. Barrett*, 321 F.2d 911 (5th Cir. 1963), and *Smith v. United States*, 75-1 U.S. Tax Cas. ¶ 9184 (N.D. Miss. 1974). See also *Jacob v. United States*, 493 F.2d 1294 (3d Cir. 1974).

34. Compare *Herculite Protective Fabrics Corp. v. Commissioner*, 387 F.2d 475 (3d Cir. 1968), and *Zanesville Inv. Co. v. Commissioner*, 335 F.2d 507 (6th Cir. 1964), with *Hall Paving Co. v. Commissioner*, 471 F.2d 261 (5th Cir. 1973), and *R.P. Collins & Co. v. United States*, 303 F.2d 142 (1st Cir. 1962). Another area of uncertainty involves the application of the dividend equivalency rule of § 356(a)(2) to an "A" reorganization. See *Rev. Rul. 75-83*, 1975 INT. REV. BULL. No. 11, at 8.

Examples of areas in which uncertainty existed for many years despite the decisions of one or more appellate courts but which now appear to be settled include the recognition of professional corporations as taxable entities (see *Rev. Rul. 70-101*, 1970-1 CUM. BULL. 278); the treatment of debt as a second class of stock for subchapter S purposes (see *Tech. Info. Rel. 1248*, 6 P-H 1973 FED. TAXES ¶ 55,385); the qualification under § 355 of spin-offs involving the horizontal division of a corporate business (see *Rev. Rul. 75-160*, 1975 INT. REV. BULL. No. 18, at 7); and the inclusion of deferred and uncollected, and due and unpaid premiums in calculating a life insurance company's assets (see *Bankers Union Life Ins. Co.*, 62 T.C. 661 (1974)). In the insurance premium situation, the Tax Court expressly rejected the suggestion that it follow the decisions of three courts of appeals which had faced the issue, but eventually changed its position after a fourth court of appeals reached the same result as the first three. *Bankers Union Life Ins. Co.*, *supra*; *Western & S. Life Ins. Co.*, 55 T.C. 1036, 1044-46 (Simpson, J., dissenting), *rev'd*, 460 F.2d 8 (6th Cir. 1971).

35. For a discussion of the caseload problems of the Court, see FEDERAL JUDICIAL CENTER STUDY GROUP, REPORT ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter cited as FREUND COMM'N REPORT] (Professor Freund was chairman of the Study Group); HRUSKA COMM'N REPORT, *supra* note 15, at 11-89.



to hear cases involving substantive questions of tax law. This may reflect a specific desire by the Court to avoid grappling with experts in an "increasingly technical and complicated" area of law.<sup>36</sup> It may also, in part, reflect a more general desire by the Court to concentrate on constitutional controversies. During the past five years, the Supreme Court has granted certiorari in approximately 30 cases involving the federal income tax laws, but less than half of those cases involved questions of substantive tax law.<sup>37</sup> With nothing to indicate a decrease in the Court's workload or a change in the Court's attitude toward tax cases, it is unreasonable to assume that the Court will expand its role in the tax field.

These problems affect all phases of the administration of tax law, from a taxpayer's own tax planning, to the effectiveness of self-assessment and administrative proceedings, to the volume and cost of tax litigation. A taxpayer who is contemplating a transaction where there has been no final judicial resolution of the issues involved will be forced to spend great amounts of time and money without knowing

36. Justice Douglas noted in his dissent in *Commissioner v. Idaho Power Co.*, 418 U.S. 1, 19 (1974):

This Court has, to many, seemed particularly ill-equipped to resolve income tax disputes between the Commissioner and the taxpayers. The reasons are (1) that the field has become increasingly technical and complicated due to the expansions of the Code and the proliferation of decisions and, (2) that we seldom see enough of them to develop any expertise in the area. Indeed, we are called upon mostly to resolve conflicts between the Circuits which more providently should go to the standing committee of the Congress for resolution.

Justice Frankfurter voiced similar feelings in a separate opinion in *Flora v. United States*, 362 U.S. 145, 177-78 (1960):

For one not a specialist in this field to examine every tax question that comes before the Court independently would involve in most cases an inquiry into the course of tax legislation and litigation far beyond the facts of the immediate case. Such an inquiry entails weeks of study and reflection. Therefore, in construing a tax law it has been my rule to follow almost blindly accepted understanding of the meaning of tax legislation, when that is manifested by long-continued, uniform practice, unless a statute leaves no admissible opening for administrative construction.

37. Among the cases involving substantive issues of tax law were *Ivan Allen Co. v. United States*, 422 U.S. 617 (1975) (involving the valuation of securities for purposes of the accumulated earnings tax); *Fausner v. Commissioner*, 413 U.S. 838 (1973) (involving commuting expenses); *United States v. Bayse*, 410 U.S. 441 (1973) (involving taxation of a nonqualified retirement plan); and *United States v. Generes*, 405 U.S. 93, *rehearing denied*, 405 U.S. 1033 (1972) (involving the definition of a business bad debt).

Among the cases not directly involving substantive tax law, five cases involved procedural issues arising from criminal prosecutions for tax evasion (e.g., *United States v. Bishop*, 412 U.S. 346 (1973); *Garner v. United States*, 501 F.2d 228 (9th Cir. 1974), *cert. granted*, 420 U.S. 923 (1975)); three involved jeopardy assessments or related procedures (e.g., *Shapiro v. United States*, 499 F.2d 527 (D.C. Cir. 1974), *cert. granted*, 420 U.S. 923 (1975)); three involved the interrelationship of the tax and bankruptcy laws (*Phelps v. United States*, 421 U.S. 330 (1975); *Otte v. United States*, 419 U.S. 43 (1974); *Kokoszka v. Belford*, 417 U.S. 642 (1974)); two involved the application of the anti-injunction statute (e.g., *United States v. American Friends Serv. Comm.*, 419 U.S. 7 (1974)); and two involved the issuance of summons (e.g., *United States v. Bisceglia*, 420 U.S. 141 (1975)).

the consequences of his actions.<sup>38</sup> Various taxpayers will predict the final judicial resolution of a given issue differently, and accordingly their methods of characterizing the transaction will differ. Divergent treatment of similar transactions by taxpayers, all of whom are acting in good faith, vitiates the effectiveness of the self-assessment system, which relies on each taxpayer to report correctly the nature of his taxable transactions.<sup>39</sup>

At the administrative level, the lack of certainty engendered by the inadequacies of the existing appellate system results in more controversies, a diversity of negotiating positions, and a greater possibility for the unequal treatment of taxpayers.<sup>40</sup> Moreover, the very nature of a segmented appellate system will encourage a party, where advantageous, to take a position different from the doctrine settled in other circuits if a reasonable basis exists for the position, and to litigate the issue in a court which has not previously decided the matter. It is not surprising that the Revenue Service's list of "prime issues"—those issues it will ordinarily insist on litigating and will not ordinarily concede or settle—includes several issues which have been decided adversely to the Government by one or more courts of appeals.<sup>41</sup>

A controversy not settled administratively becomes a case to be added to the already crowded dockets of the trial courts. Under the present system, the lack of certainty in the law faced by the parties in attempting to settle the case administratively must again be faced by the trial court, because the trial court (excluding the Court of Claims) is bound only by the decisions of the Supreme Court and the court of appeals for the circuit in which it sits.<sup>42</sup> During fiscal year 1974, close to 10,000 new tax cases were filed in the trial courts;<sup>43</sup> over 16,000 cases were pending on July 1, 1973.<sup>44</sup> It is expected that the number of filings will continue to increase under the present system, especially in light of the Tax Court's newly assigned declaratory judgment jurisdiction in the pension law area and suggestions that this jurisdiction

38. See, e.g., Griswold, *supra* note 5, at 1155-56.

39. See Del Cotto, *supra* note 14, at 6.

40. See *id.*; Eisenstein, *supra* note 14, at 488-89.

41. The list of "prime issues" is reprinted at CCH 1975 STAND. FED. TAX REP. ¶ 195.

42. See Jack E. Golsen, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971) (discussing the effect to be given a decision of the court of appeals to which the case was appealable). The Court of Claims is bound only by its own decisions and those of the Supreme Court; a case heard by the Court of Claims establishes a rule of law only for that court. Although the Court of Claims has national jurisdiction, it hears only a small number of tax cases each year. For example, in 1974, 124 tax cases were filed in the Court of Claims, as compared with 8,799 in the Tax Court. 1974 COMMISSIONER'S ANNUAL REPORT, *supra* note 20, at 40-41.

43. See note 20 *supra*.

44. See 1974 COMMISSIONER'S ANNUAL REPORT, *supra* note 20, at 40-46.

be expanded to include determinations of the tax-exempt status of organizations under § 501(c)(3).

The present adjudicatory system also encourages duplicative litigation on the appellate court level. As noted above, a taxpayer is encouraged to litigate in one court of appeals issues which already have been decided in another court of appeals. Similarly, in our segmented appellate system, the Supreme Court's reluctance or inability to hear a significant number of tax cases gives the Government good reason or ready excuse to avoid seeking Supreme Court review of an unfavorable court of appeals decision and yet to refuse to follow the ruling when dealing with taxpayers in other circuits. The Government realizes that the Supreme Court will hear only a few tax cases each term and that it must limit its requests for certiorari if they are to receive serious consideration. The Government will often seek to litigate an issue in another court of appeals in an attempt to develop a conflict between the courts of appeals which would serve as the basis for a strong petition for certiorari.<sup>45</sup> Both in increased litigation expenses and in the heavier burdens placed on all federal courts, taxpayers pay a high price for the present system of tax litigation.

In contrast to the present appellate court system, a Court of Tax Appeals could speedily develop nationally binding rules and guidelines to cover any issue of tax law. The development of such rules and guidelines would discourage duplicative litigation and encourage administrative resolution of controversies. No longer would a taxpayer be encouraged not to follow an appellate court decision whenever there was a plausible alternate result, because the rule established by the Court of Tax Appeals would apply to all taxpayers. So, too, the Revenue Service should no longer refuse to follow an appellate decision; nor would the Revenue Service find it desirable to avoid Supreme Court review of unfavorable decisions.

A Court of Tax Appeals would do more, however, than simply reduce the amount of duplicative tax litigation. In rendering decisions of national applicability concerning important problems in the tax law, a Court of Tax Appeals also could provide guideposts for the resolution of analogous issues. Such guideposts could be used not only by trial level judges confronted with these issues, but by the Revenue Service in the administrative resolution of controversies and by taxpayers planning their own transactions.

It is a unique combination of institutional factors—the complexity of the tax law, the large number of persons directly affected by

45. See Dwan, *supra* note 14; Walters, *supra* note 14.

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it and the reliance on self-assessment and the administrative resolution of controversies—which renders tax law peculiarly susceptible to the adverse effects of uncertainty. A healthy tax system in this country requires the elimination—or at least the substantial reduction—of the uncertainty in the interpretation of the tax law caused by the present appellate court system. It is of interest to note that when customs duties were the major source of the country's income, a specialized court of appeals for customs cases was established to eliminate uncertainty and delay in the administration of customs law caused by a segmented appellate court system.<sup>46</sup> Some commentators have sought to distinguish tax law from customs law on the theory that the latter affects so few people. However, it is precisely because tax law affects so many people that the need for a Court of Tax Appeals is significant. As the Study Group on the Caseload of the Supreme Court stated:

Federal taxation, because of the complexity of the subject, the volume of litigation, and the urgent need to resolve uncertainties and conflicts in the interest of both taxpayers and Treasury, may be deemed a particularly appropriate subject for a specialized court of appeals.<sup>47</sup>

### III. Alternatives to a Court of Tax Appeals

The analysis above demonstrates the need for reform in the system of appellate review of federal tax litigation and suggests that creation of a Court of Tax Appeals would be an effective mode of reform. Some commentators, however, while agreeing that reform is needed, have instead proposed procedural modifications of the present system or use of national appellate courts with jurisdiction over more than tax matters. I believe that the focus of these suggestions is misplaced, and that tax reformers should concentrate on the best methods of establishing a Court of Tax Appeals.

The reform proposals easiest to dismiss are those which involve procedural modifications of the present appellate system. One common idea would require that the Government either seek Supreme Court review of an adverse court of appeals decision or follow the court of appeals holding.<sup>48</sup> Such a requirement would not improve the present system. In light of the Supreme Court's heavy workload, the number

46. See Bland, *supra* note 1, at 1013-14; Dwan, *supra* note 14, at 585 n.14; Griswold, *supra* note 5, at 1174-76.

47. FREUND COMM'N REPORT, *supra* note 35, at 11-12.

48. See, e.g., Angell, *supra* note 3, at 163-64; Nevitt, *Achieving Uniformity Among the 11 Courts of Last Resort*, 34 TAXES 311 (1956).

of tax cases which the Supreme Court reviews would not likely increase. Asking for certiorari would be a hollow ceremony in most cases.

Other suggestions focus on procedural reform at the court of appeals level. Proposals include narrowing the scope of review of lower court decisions, combining two circuits to hear a tax case, requiring that each panel which hears a tax case include one "tax judge," and considering the first court of appeals decision of an issue determinative until the Supreme Court holds otherwise.<sup>49</sup> Narrowing the scope of review would not significantly decrease uncertainty and delay. If the scope of review of legal issues were narrowed, uncertainty might in fact increase, because appellate courts might be required to affirm reasonable but divergent Tax Court and district court interpretations of the law. Similarly, the review of factual issues should not be narrowed. Rule 52(a) of the Federal Rules of Civil Procedure provides that where a trial has been by a judge without jury, the judge's findings must stand unless clearly erroneous. (The vast majority of civil cases are tried without a jury.) Any reduction in the scope of review of the facts would merely remove one safeguard against judicial abuse without increasing the certainty of tax administration.

Combining two courts of appeals to hear tax cases would not substantially eliminate the effects of a segmented appellate court system. Six tax courts of appeals and the Court of Claims would still remain, each not bound by the others' decisions. The appointment of a "tax judge" to each panel would be fraught with administrative difficulties and would not prevent divergence among 11 courts of appeals and a Court of Claims. Allowing the first court of appeals decision on an issue to be determinative in the absence of Supreme Court review would not necessarily reduce delay or uncertainty, because the pattern of such decisions would not always be internally consistent. Different courts might reach conflicting results in analogous but not identical situations. If one is willing to be bound by the first appellate level decision, it would seem more sensible to establish a single court to render such decisions.<sup>50</sup>

A proposal more far-reaching than the procedural changes above

49. See ABA, SECTION OF TAXATION, *supra* note 12; Goldring, *supra* note 15, at 447-49; Nevitt, *supra* note 48, at 314; Prettyman, *A Comment on the Traynor Plan for Revision of Federal Tax Procedure*, *supra* note 3, at 1049-50.

50. It has even been suggested that tax law be made more like the English system under which rates and not substance are changed. Angell, *supra* note 3, at 161-62. Such a change is clearly impractical. Congress has chosen to adopt a tax law which encompasses social and economic policy, and such a choice is deeply imbedded in our system of taxation.

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was offered recently by Dean Griswold.<sup>51</sup> Unlike some other proposals discussed in this Comment, Griswold's new plan for an additional national appellate court is not directed exclusively towards the tax law. Rather it calls for the establishment of a court of general jurisdiction to provide "a nationally binding appellate capacity in this country." The status of this "National Court of the United States" would be intermediate between the courts of appeals and the Supreme Court. Its cases would come on assignment from the Supreme Court. All petitions for certiorari and appeals would be considered by the Supreme Court; however, the Supreme Court would grant review in twice as many cases as it now does and would assign half of those cases (approximately 150-160) to the National Court. Cases heard by the National Court would still be subject to Supreme Court review; but, Griswold argues, the Supreme Court would rarely exercise its power of review. The cases most probably assigned to the National Court would emphasize controversies in tax, patent, antitrust, labor, Federal Power Commission, and Federal Trade Commission law. In a footnote at the conclusion of his article Griswold states:

A good many years ago I wrote an article proposing that there should be a special court to hear appeals in tax cases. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV L. REV. 1153 (1944). The suggestion met strong opposition because, among other things, it would establish a specialized tribunal in tax cases. The present proposal would appear to meet all the objectives of my plan of 30 years ago, but the tribunal suggested would not in any sense be a specialized court.<sup>52</sup>

The new Griswold proposal does not, of course, necessarily foreclose his original idea. As the Hruska Commission pointed out, "[s]pecialized courts and a National Court of Appeals are not mutually exclusive."<sup>53</sup> But if one is forced to choose between the two, Griswold's 1944 proposal comes closer to solving the problems of our present tax litigation system than does his more recent suggestion.

A segmented appellate system will contain uncertainty, even in the absence of conflicting judicial decisions, whenever there is a reason-

51. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335 (1975). See HRUSKA COMM'N REPORT, *supra* note 15, at v-vii (in which a similar proposal is made).

52. Griswold, *supra* note 51, at 353 n.59. See also the statement of Mortimer Caplin in II COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, 1975 HEARINGS 1173. Former IRS Commissioner Caplin supported the establishment of a new National Court of Appeals, but apparently only on the basis of his belief "that a broader consensus will be achieved by supporting legislation . . . [creating] a new National Court of Appeals [than a Court of Tax Appeals]." *Id.* at 1185.

53. HRUSKA COMM'N REPORT, *supra* note 15, at 63 n.40.

able possibility that another court might adopt a different rule of law. The Griswold proposal for a National Court does not eliminate this uncertainty; it merely places a new level of discretionary review above the existing segmented system. This additional level of review would permit the consideration of more tax cases at the Supreme Court and quasi-Supreme Court level. But the number of cases heard still would be within the discretion of the Supreme Court, which would probably continue to limit review to cases involving conflicting decisions of the courts of appeals. Moreover, since cases would be heard by the new court only if the Supreme Court granted certiorari, the Government might be encouraged to continue its occasional practice of neither following nor appealing an adverse circuit court decision, in order to reduce the number and thereby increase the import of its petitions for certiorari. Such a system would, in essence, be a continuation of our present appellate system—one which Griswold criticized in 1944 and under which

it is not enough to litigate a tax question. It must be litigated twice, or three times, or four times. . . .

. . . And until the Supreme Court has decided it [or under the new Griswold proposal, the National Court of Appeals has decided it], there is virtually nothing that the taxpayer or his counsel—or the Government—can rely on.<sup>54</sup>

A final alternative to a Court of Tax Appeals is a proposal put forward by a past chairman of the Section of Taxation of the American Bar Association, to have tax appeals handled by a generalist court somewhat different from Dean Griswold's National Court.<sup>55</sup> The proposal is based on the need for an appellate court of national jurisdiction able to resolve tax controversies in greater number than does the Supreme Court. However, its supporters would oppose the creation of a Court of Tax Appeals in the belief that a taxpayer is entitled to have his appeal from a trial court reviewed by generalist judges who handle more than tax cases and who recognize the importance of the state law problems involved in tax litigation.

The proposal provides for the establishment of a "National Division" of the court of appeals which would have jurisdiction to hear appeals from decisions of the courts of appeals and the Court of Claims, both in tax cases and in some other controversies involving an intermeshing of federal law with local property law, contract law, or trusts and

54. Griswold, *supra* note 5, at 1154-55, 1156.

55. See *Statement of K. Martin Worthy*, 28 TAX LAW. 21 (1974) [hereinafter cited as *Worthy*].

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estates law. Review would be available as a matter of right if a conflict in the circuits existed, and by certiorari if the issue were important to the administration of the tax law. If both parties agreed, appeal could be taken to the National Division directly from the trial court. The Division would always sit en banc, and its decisions would be reviewable by the Supreme Court, although the Supreme Court would likely limit such review.

The Section of Taxation plan for unified appellate review by a National Division suffers from many of the same problems as Dean Griswold's proposal for a National Court. In providing review as a matter of right only if there is a conflict in the circuits, the proposal fails to lessen the uncertainty in tax planning and delay in administration which exists, even in the absence of split circuits, so long as there is some reasonable alternative to the rule which any one circuit has adopted. It is difficult to tell, because of the nontax caseload of a National Division, how frequently the court would grant discretionary review in tax cases. If review were limited, the Government could be expected to continue its practice of sometimes neither following nor appealing an adverse circuit court decision, on grounds that the National Division would not grant all of the Government's petitions for certiorari.

If the National Division did grant frequent review in tax cases, it would in effect become an additional level of appeal below the Supreme Court. The justification for such an additional level, with the corresponding increase in litigation costs, is that a taxpayer is entitled to have generalist judges decide his appeal. Yet the judges of the National Division would not be legal generalists in the true sense, but rather specialists in tax and other selected technical areas of federal law which the Supreme Court is reluctant to handle. In a Court of Tax Appeals established in the form suggested by this Comment, a taxpayer's case would instead be decided by a combination of generalists and specialists, and the taxpayer would normally incur the cost of only one appeal from the trial level.

### IV. A Court of Tax Appeals: Implementation

The most effective method of eliminating, or at least minimizing, uncertainty and delay in the resolution of tax controversies is the establishment of a Court of Tax Appeals. Moreover, it is possible to tailor the design of such a court to overcome the objections which have been raised against the idea in the past and which might be expected to be raised again in the future.



One cluster of objections to a Court of Tax Appeals is based on the thesis that such a court would not solve any of the perceived problems of our present system of tax litigation because, first, its decisions would always be subject to Supreme Court review, and second, because the new court could not manage its expected caseload. The first objection is unrealistic. Though decisions of the Court of Tax Appeals as proposed in this Comment would be subject to Supreme Court review, such review would probably be quite limited, as it is in customs and patent cases.<sup>56</sup> In essence, the Supreme Court would serve as a "safety valve" in the interpretation of the tax law; if certiorari were denied in a case, it would be extremely rare for certiorari later to be granted in a case involving the same issue. Such a possibility would remove Court of Tax Appeals decisions from the realm of absolute certainty, but it should not prevent the decisions from serving as a sound basis on which to rely in planning transactions and in resolving disputes at the administrative level.<sup>57</sup>

The objection that the Court of Tax Appeals could not manage its expected caseload is also without merit. Though the court would have to travel to hear cases in order to secure taxpayers a reasonable opportunity to appear before the court, the same practice has been successfully followed by the Tax Court, which holds periodic hearings at various locations around the country.

Nor does uniformity require a hearing en banc in every case considered by the Court of Tax Appeals. The court could function in much the same manner as do the present courts of appeals: a decision by a division of the court would constitute precedent which, by stare decisis, would guide the court in subsequent cases involving the same issue. Provision could be made for en banc hearings in certain selected cases. For example, the chief judge could be given authority to direct a hearing en banc when he considers it appropriate. The court as a whole also could be given authority to decide, by majority vote on a motion made by a party, to grant a hearing or rehearing en banc.

Given the number of appeals filed from civil tax cases in the Tax Court and the district courts in the past several years, and adding appeals which may be filed from cases in the Court of Claims, filings in a Court of Tax Appeals could be expected to total about 500 per year.<sup>58</sup> Based solely on the average caseload of a court of appeals judge,

56. See Griswold, *supra* note 5, at 1168, 1175-76.

57. If the existence of Supreme Court review prevents the new court from achieving its goals, the solution is not to oppose creation of the court but rather to limit Supreme Court review of civil tax cases to those involving constitutional issues. See H. FRIENDLY, *supra* note 16, at 167.

58. H. FRIENDLY, *supra* note 16, at 163; Worthy, *supra* note 55, at 22. See 1974 COMMISSIONER'S ANNUAL REPORT, *supra* note 20, at 106.

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a court of five judges would be more than sufficient to meet the expected demand.<sup>59</sup> However, the judges of the Court of Tax Appeals would be required to travel more than do present court of appeals judges, and in order to give full consideration to major issues, they would be required to hear a greater percentage of cases en banc. Additionally, it should be expected that appeals to the Court of Tax Appeals would more frequently involve issues of complexity and difficulty than do appeals to the present courts of appeals.<sup>60</sup> Under such circumstances, a nine-judge court, consisting of three divisions of three judges each, could manage the expected caseload<sup>61</sup> without sacrificing uniformity of decisions.

In addition to the above criticisms, opponents of a Court of Tax Appeals might fear that appointments to such a court will be subject to political pressure and that a specialized court will reach technical decisions that ignore developments important in other parts of federal law. Such arguments are often advanced against specialized courts,<sup>62</sup> but they have little merit when made with respect to a Court of Tax Appeals, especially if appropriate steps are taken in organizing the court.<sup>63</sup> It has been suggested that appointments to the court might

59. In 1972 the number of terminations per appellate court judgeship was 143; in 1971 it was 128. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 93 (1972); *id.* at 107 (1971). Since appeals are acted on by three-judge panels or en banc, the average court of appeals judge would have participated in the disposition of over 400 cases in 1972 and over 350 cases in 1971. This number may be somewhat lower when account is taken of senior circuit judges and judges sitting by designation.

60. See H. FRIENDLY, *supra* note 16, at 164. Appeals of tax cases generally present legal issues of greater than average difficulty because the Code itself is so complex, because the system of administrative appeals filters out many frivolous claims, and because controversies which depend on factual issues are rarely appealed beyond the trial level by the Government.

61. See *id.*; Griswold, *supra* note 5, at 1180. Because a single court could handle the caseload of a Court of Tax Appeals, it would not be necessary to limit the right to appeal from the decisions of trial courts in civil tax cases. *But see* Carrington, *supra* note 14, at 605-06; Roberts, Friedman, Ginsburg, *et al.*, *supra* note 14, at 356. Limiting the right to appeal trial court decisions should be considered only when such a limitation would be absolutely necessary to the functioning of the tax litigation system.

62. See, e.g., FREUND COMM'N REPORT, *supra* note 35, at 11.

63. One current argument is, however, directed more toward the concept of a single national Court of Tax Appeals than to the method of organizing such a court: the contention that a single appellate-level court would hinder the search, presumably by the Supreme Court, for the right answer in the resolution of tax controversies.

The present system of appellate court review does enable several courts of appeals to consider the same issue, but there is no evidence to show that a second or third court of appeals decision on an issue is less frequently overruled than the first, or that the "right answer" requires the consideration of an issue by more than one court of appeals. Indeed, it may be persuasively argued that having a stable interpretation of the tax law which can be relied on in planning transactions is more important than the question of whether the interpretation is the theoretically right answer. See H. FRIENDLY, *supra* note 16, at 167; Pope, *supra* note 14, at 278; Roberts, Friedman, Ginsburg, *et al.*, *supra* note 14, at 358; Worthy, *supra* note 55, at 22. For views on whether a right answer even exists, see

consist of lame duck members of an administration or other unqualified political favorites.<sup>64</sup> It cannot be denied that such appointments have been made to specialized courts in the past. However, the quality of appointments to such courts has generally been high, and rigorous review by the Senate of a nominee's qualifications would guard against abuse.<sup>65</sup> The potential for political abuse presented by giving power to one person to appoint all the Court of Tax Appeals judges at one time could be controlled by having the appointment of the permanent judges occur over a period of several years. Any fear that appointments might center around one issue or set of issues seems misplaced, because federal taxation is too broad an area of the law to allow easy characterization of a nominee's views and affects too many interests to allow any single group easy sway over choice of nominees.<sup>66</sup> There is no indication that appointments to the United States Tax Court have been based on such considerations.<sup>67</sup>

The final, and perhaps principal, objection to a Court of Tax Appeals which has been raised frequently in the past is that a Court of

Griswold, *supra* note 5, at 1190-91; Pope, *supra* note 14, at 277; Surrey, *Some Suggested Topics in the Field of Tax Administration*, *supra* note 3, at 419; Youngquist, *supra* note 3, at 295-96.

64. See generally *Panel Discussion*, *supra* note 15, at 702-03.

65. See H. FRIENDLY, *supra* note 16, at 165-66.

66. In this regard a Court of Tax Appeals should be distinguished from the Commerce Court, the demise of which one commentator has offered as indication that a Court of Tax Appeals would also fail. Miller, *supra* note 9, at 307. The Commerce Court was created despite strong opposition in Congress; indeed, its opponents never ceased their efforts to abolish the court. A major reason for the opposition was the fear that "railroad men" would dominate the court and limit the power of the Interstate Commerce Commission in railroad regulation cases. The court did reverse many ICC decisions; it was itself reversed by the Supreme Court many times. The court was abolished after a short time, destroyed by the political role which it had been required to play in determining the extent of the power of the ICC to regulate industries such as the railroads. See Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System: IV. Federal Courts of Specialized Jurisdiction*, 39 HARV. L. REV. 587 (1926). The tax law affects a very broad spectrum of activities and people, and it is doubtful that the Court of Tax Appeals would center its attention on one set of politically oriented issues. Such politicization has not occurred in the Tax Court or the Court of Customs and Patent Appeals, even though the latter's jurisdiction is considerably narrower than tax law.

67. It has also been suggested that the qualifications of a nominee for the Court of Tax Appeals would only be subject to the scrutiny of the tax bar, so that the public's control over a lifetime appointee would be lost. But there would be no requirement that only tax lawyers could practice before the Court of Tax Appeals, so a broader group than tax specialists should be interested in the performance of Court of Tax Appeals judges. Furthermore, under the present system, a judge's tax decisions constitute only a small portion of his opinions and may not always be carefully considered in evaluating his performance. Thus, it might be contended that specialization would give rise to closer scrutiny of a judge's ability. And because he would deal with tax law alone, a specialized judge might be able to develop a better understanding of the subtleties of tax law and prepare better opinions than a judge who only occasionally writes opinions in tax cases. See *Panel Discussion*, *supra* note 15, at 702; Roberts, Friedman, Ginsburg, *et al.*, *supra* note 14, at 355.

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Tax Appeals might reach technical decisions which ignore common developments in the law.<sup>68</sup> The court would indeed be a specialized court and might on occasion issue technical and complex opinions. But the Internal Revenue Code is a complex document with many technical and detailed provisions, and a certain expertise is needed to properly interpret and understand it. In this sense, tax litigation requires technical decisions, and opinions written by judges who are well-versed in the subtleties of the tax law are to be encouraged. In addition, there is no reason to expect that the decisions of the Court of Tax Appeals would ignore common developments in the law. Federal tax considerations are involved in nearly every legal endeavor. As a result, a tax lawyer

must deal constantly not only with statutes and committee reports and regulations, but also with questions of property, contracts, agency, partnerships, corporations, equity, trusts, insurance, procedure, accounting, economics, ethics, philosophy. He must be broad in his background and broad in his outlook . . . .<sup>69</sup>

Similarly, a judge on the proposed court would work in an environment which required contact with the many areas of law. At present, both the Tax Court and the district courts hear tax cases, and there is no indication that Tax Court opinions are more insular than district court opinions.

In addition, steps could be taken in the organization of a Court of Tax Appeals to assure that the results reached by the new court would not be in conflict with developments in the general law. For example, three of the nine judges could be given limited terms and could be chosen from the present district court and court of appeals judges, with at least one such "generalist" judge assigned to hear each appeal.<sup>70</sup> The term of the temporary appointments would be long enough to encourage sitting judges to accept the appointments and to adjust to the work of the court, but short enough that these judges would not wholly lose their earlier perspective. The appropriate period would be from two to four years. Appointing a few judges on a nonpermanent

68. It has also been argued that judges of a Court of Tax Appeals could not properly decide cases involving issues of local law. I will not enter the controversy concerning the extent to which local law is involved in tax litigation (*compare* Traynor, *supra* note 3, at 1431-32, *with* Angell, *supra* note 3, at 155). It is sufficient to note that the Tax Court successfully decides local law issues, as do the courts of appeals, even though the panels may or may not include a judge from the state whose law is being construed. If any peculiarities of state law are not readily apparent, they can be explained by the parties in their briefs and oral arguments before the court.

69. Griswold, *supra* note 5, at 1183-84.

70. See Pope, *supra* note 14, at 277.

basis would also avoid the political problem of allowing one President to determine the character of the court for many years.<sup>71</sup>

## V. A Proposal

In the past, much of the discussion of proposals to establish a Court of Tax Appeals has focused not on the merits of the concept, but rather on objections which can be overcome by careful implementation. I am presenting the following draft proposal for a Court of Tax Appeals in the hope that it will overcome such objections and redirect attention to the urgent need for a national appellate tax court.

(1) There shall be established under Article III of the Constitution of the United States a court of record to be known as the United States Court of Tax Appeals. The Court shall have nine judges, one of whom shall be Chief Judge.

(2) The Court of Tax Appeals shall have exclusive jurisdiction of all appeals from judgments and final orders of the United States district courts, the United States Tax Court, and the United States Court of Claims, in all cases between taxpayers and the United States involving the federal tax laws, except its criminal provisions. Appeal to the Court of Tax Appeals is available as of right. Judgments of the Court of Tax Appeals shall be subject to review only by the Supreme Court of the United States by writ of certiorari, in the manner provided in § 1254 of Title 28 of the United States Code.

71. One other objection to a Court of Tax Appeals which has been made in the past is that what is now § 7482 of the Code evinces congressional opposition to such a court. Section 7482 provides:

(a) Jurisdiction.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

Section 7482 was a response to *Dobson v. Commissioner*, 320 U.S. 489 (1943), in which the Supreme Court attempted to reduce the number of appeals and inconsistencies developing among the courts of appeals by restricting review of Tax Court decisions to clear mistakes of law. Some courts of appeals interpreted *Dobson* so as to relieve themselves of review of Tax Court decisions, while others viewed it as an encroachment on their powers. Criticism was also directed at the opinion for establishing a different standard for court of appeals review depending on whether the case originated in the Tax Court or district court. See Nevitt, *supra* note 48, at 314-15. To eliminate such a dual standard, Congress in 1948 enacted the predecessor of § 7482(a). Congress intended that the new statute make review of Tax Court decisions as stringent as the review of district court cases. 94 CONG. REC. 8500-01 (1948). This legislation does not show that Congress is opposed to establishment of a specialized appeals court; rather, it shows that in 1948 Congress wanted all trial court decisions to be subject to the same scope of review by the courts of appeals. Cf. *Commissioner v. Duberstein*, 363 U.S. 278, 291 n.13 (1960).

The jurisdictional provision allows appeal as of right to the Court of Tax Appeals for all federal tax issues raised in federal trial courts in cases in which the United States is a party, excluding questions of criminal liability. Challenges to the constitutionality of a substantive tax provision and challenges to the constitutionality of Revenue Service procedures are within the exclusive jurisdiction of the court. Criminal cases are not included within the court's jurisdiction because they are generally more involved with issues of criminal law than with tax law and should be dealt with by courts which regularly decide issues of criminal law. Review of Court of Claims decisions is provided to assure uniformity.

The proposal allows appeals to the Court of Tax Appeals from suits in which the United States is a plaintiff, such as actions to recover excessive refunds and in rem proceedings brought by the United States to levy the property of a taxpayer who has not met assessed and due tax obligations. This group of cases should be included within the court's jurisdiction because many of the provisions empowering the Government to bring such suits are contained within the Code, and because the defenses to such actions may involve consideration of the underlying tax liability itself. On the other hand, if inclusion should prove infeasible, these cases could be removed from the court's jurisdiction without great harm to the court's underlying purpose.<sup>72</sup>

State court decisions which affect the federal tax obligations of parties (such as suits to determine the existence of a trust) are not included in the court's jurisdiction. Such suits are usually inextricably interwoven with issues of state law beyond the appropriate range of the court's interests. In addition, the United States is usually not present as an intervenor in such lawsuits and has no opportunity to argue the merits or point out consequences to national tax policy; the opinions rendered in state court suits thus have limited precedential value for the administration of federal taxes.

The Court of Tax Appeals would have pendent jurisdiction over any other federal and state law questions raised in an appeal from a federal trial court involving federal tax law questions. Such pendent issues would be rare, however, as most cases heard by the court would start as deficiency suits in the Tax Court or refund suits in the district courts or the Court of Claims.

(3)(a) The Chief Judge and other permanent members of the Court of Tax Appeals shall be appointed by the President with the advice of the Senate, and shall serve during good behavior.

72. See H. FRIENDLY, *supra* note 16, at 163 n.45.

(b) Temporary members shall be designated by the Chief Justice of the United States from among the judges of the United States district courts and courts of appeals for terms of not less than two [four] years, except that initial assignments to the Court may be for a longer period as provided in subsection (c).

The method of appointment for temporary members is derived from that used in the establishment of the Emergency Court of Appeals.<sup>73</sup> The inclusion of temporary members is intended to provide the court with "generalist" judges. The two or four year term is intended as the basic term, long enough to be practical and short enough to assure a continued influx of generalist judges. It might be beneficial to stagger the terms of the temporary judges; this could be accomplished by making some initial assignments for terms of longer than two years. Having longer initial terms also would avoid the problem of replacing the six initial judges within a short period of time.

The selection of the temporary judges from among current district court and court of appeals judges would preserve the Article III character of the Court of Tax Appeals, since the judges temporarily assigned would have life tenure in their regular appointments.<sup>74</sup> The present problems of workload faced by the federal courts pose no insuperable obstacle. It seems likely that at least some of the circuit courts and district courts would be able to release a judge for temporary service, particularly since the circuit court caseloads would no longer include tax cases.<sup>75</sup>

73. 56 Stat. 32 (1942).

74. Article III provides that judges of inferior federal courts established under Article III power "shall hold their Offices during good Behaviour . . . ." Temporary assignment of a judge to the Court of Tax Appeals should no more abrogate this requirement of lifetime tenure than does the common practice of "sitting by designation" in another district or circuit, so long as the assignment is reasonably short and is made only with the judge's consent.

75. As a last resort, Congress might create several new circuit court judgeships. These judges would be subject to temporary assignment to any circuit or district court from which a Tax Appeals judge had been recruited, to bring those courts up to full strength. The power to make temporary assignments of the circuit judges to other circuit courts would reside in the Chief Justice, as it does presently. *See* 28 U.S.C. § 291(a) (1970). Assignments to district courts in other circuits could be made, under present legislation, in two steps: first to the other circuit court, by assignment from the Chief Justice; then to the district court, by assignment from the chief judge of the circuit or from the circuit justice. *See* 28 U.S.C. § 291(a), (c) (1970). However, relying on such broad use of the power of temporary assignment may be unwise, because it undermines the usual expectations of stability which surround a tenured judgeship. It seems likely that enough judges can be found to serve on the Court of Tax Appeals without creating additional judgeships.

Judge Hufstedler has proposed the use of "floating" circuit judgeships to handle the vacancies which would be created by appointments to the recently proposed "National Division" of the Court of Appeals. *See* II COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, 1975 HEARINGS 11 (Statement of Judge Shirley Hufstedler).

(c) [*Alternative 1*]: Initially, the Court shall consist of three permanent members and six temporary members. At the end of the fourth year and every second year thereafter, one temporary member shall be replaced by a permanent member until such time as there are six permanent members.

Six temporary members are included initially to allow permanent members to be appointed over a longer period of time. Initially, there should be three permanent members, including the Chief Judge. The number of permanent members initially appointed might be increased, should the value of the greater consistency which permanent appointments provide seem to outweigh the disadvantages of allowing a single President to appoint a large majority of the permanent members.

(c) [*Alternative 2*]: Initially, the Court shall consist of one permanent member and eight temporary members. At the end of the fourth year and every second year thereafter, one temporary member shall be replaced by a permanent member until such time as there are three permanent members.

If the prevailing view is that the majority of the judges should be generalists, and if enough judges are likely to be willing to serve on the new court on a temporary basis, consideration might be given to the alternative of having six temporary judges and three permanent judges.

(4)(a) The Court shall hear cases in divisions of three, unless consideration en banc is ordered by the Chief Judge or by a majority of the Court.

Cases generally will be heard by divisions so that the caseload can be met, but en banc consideration will be available where necessary to assure uniformity. The term "consideration" rather than "hearing" is used to make clear that the court need not rehear a case en banc that already has been argued, but rather may review it, as the Tax Court presently does, on the basis of the submitted briefs and prior oral argument. Required rehearings would be especially burdensome for a court which would hear cases at locations throughout the country. It should be noted that the suggested language permits the initial hearing of an important case to be en banc.

(b) Each division shall include at least one temporary member. Within such confines, the Chief Judge shall from time to time establish divisions and change their composition.



The changes in composition of the divisions are intended to further assure uniformity of decision, by preventing the emergence of distinct bodies of case law attributable to separate divisions.

(5) The Court shall have its offices in Washington, D.C. The times and places of the sessions of the Court or its divisions shall be prescribed by the Chief Judge in a manner that secures reasonable opportunity to taxpayers to appear.

This provision is intended to provide for sessions of the court or its divisions at locations throughout the country. Other provisions, such as the court's seal, filing fees, and retirement plans, do not present problems unique to a Court of Tax Appeals, and could easily be patterned after other Article III courts, such as the courts of appeals.

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